

In the United States
Circuit Court of Appeals
For the Ninth Circuit. 8

EDWARD E. BRAMLETT, CHARLES R. BRAMLETT, GORDON
F. HATCHER, E. DANA BROOKS, JULIUS GOLDFARB,
MEYER GOLDFARB, V. R. JAMES and E. G. HEIDEN,
Appellants,

vs.

NATIONAL UNIT CORPORATION, a corporation,
Appellee,

BRIEF FOR APPELLEE.

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No. 9014.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This case involves infringement of patent 2,028,838 for a container and dispenser (Book of Exhibits, pp. 1 to 7), and particularly as regards claims 2 and 3 thereof.

Appellants argue that the decree should be reversed, alleging that the lower court erred in finding the patent valid and infringed.

The Patent in Suit.

The patent describes and claims a structure for facilitating the distribution of viscous material, such as mayonnaise, from a closed container 42 (Figs. 1, 2 and 3).

The objects of the invention are well stated on page 1 of the patent (Book of Exhibits, p. 5) in the following language:

“The invention is particularly directed toward a container and dispensing means whereby a relatively viscous fluid or emulsion such as mayonnaise, may be dispensed in a sanitary manner and all of the contents of the container removed therefrom without exposing such contents to contaminating influences.

“Heretofore, bulk materials such as mayonnaise, have been dispensed from crocks or jars into which a utensil such as a spoon, was dipped in order to withdraw the desired quantity. During such withdrawal, the contents of the container were exposed to the atmosphere, permitting various forms of impurities, dust, etc., to be deposited therein. Furthermore, it was extremely difficult, if not impossible, to remove all of the contents of such containers.”

“* * * Furthermore, during the dispensing operation, the mayonnaise is discharged from the container into the smaller package delivered to the ultimate consumer but at no time is the bulk of the mayonnaise exposed to contaminating influences. Moreover, the dispensing unit is readily removable from the container for sterilizing purposes.”

“It is to be remembered that in the transportation and handling of a product such as mayonnaise, the product needs be handled with care as it is possible to cause separation of the ingredients constituting the

product by undue agitation or the like. For this reason, the dispensing apparatus has been particularly designed to permit the discharge of quantities of mayonnaise from a container without subjecting it to undue agitation or changes in pressure.” (Page 1, column 1, lines 7 *et seq.*)

In order to insure cleanliness, the patentee provides a container 42 that is capable of holding as much as five gallons. (Book of Exhibits, p. 6, column 1, lines 58 *et seq.*) These containers are shown as conical, and have an opening at the small end for filling and emptying. They may be appropriately sealed in a temporary manner at the factory, for transportation to a retailer.

For purchases in small quantities, such as pints or quarts, the retailer is enabled to withdraw the desired amount from the large container 42. For this purpose, use is made of a “feeder” or “pump” 10 (Book of Exhibits, Fig. 3, p. 2) which has screw threads 40 adapted to be threaded in a tight manner on the small open end of the “cone” 42. This feeder has a handle 25, for operating a plunger 23 in a horizontal direction, for forcing mayonnaise out through a discharge spout 17. This spout (Book of Exhibits, Figs. 5 and 6, p. 4) is intended to be closed by a cover 28 when the pump is not in use.

Due to the viscous nature of mayonnaise, it would be impossible to provide any flow through the inverted lower end of the cone 42 without the feeder mechanism. The particular details of the feeder are not of importance. It is sufficient to state that by a pull on the handle 25, pressure is exerted on the mayonnaise to force it through the spout 17.

The handle 25 must be rather energetically operated to expel the mayonnaise. And since, for sanitary reasons, the feeder 10 is firmly secured to the restricted opening of the inverted cone 42, this requires that the cone 42 and its feeder 10 be maintained in a stable position. The assembled container and the feeder are supported for this purpose in a specially designed stand 1. (Book of Exhibits, Figs. 1 and 2, p. 2.) This stand is so arranged that the assembled container and feeder may be readily removed from the stand to facilitate placing a refill therein. The stand is especially adapted to maintain the inverted container 42 and feeder 10 in a stable manner. For this purpose, the patentee provides a conical-like sheet metal structure, having a wide base, and a top into which the small end of the container 42 is passed. The top rim of the stand 1 thus engages the container 42 intermediate its base and the restricted top.

The stand 1 is provided with an opening 2 to permit passage of feeder 10 into the position of Fig. 2. In order to brace the stand, horizontal brace 5 is attached to the inner surface of the stand.

Further to steady the inverted container assembly, a restraining device or rest 3 (Book of Exhibits, Figs. 2, 3, 4, 6, pp. 2 and 4) is used. This restraining means is fastened to braces 4 and 5, and upon it the bottom surface of the feeder 10 is disposed. This is shown to best advantage in Fig. 4, page 4, Book of Exhibits. A knob 12 attached to the feeder 10 is intended to pass through the opening 13 of the restraining means.

By virtue of the stabilizing supports provided by the stand 1, the removable assembly of container and feeder can be operated to expel mayonnaise without danger of unduly shaking the container or of moving it off the stand.

Plaintiff's physical exhibit 5 is an exemplification of the patented structure.

Of course, water or other freely flowing fluids may readily be dispensed from inverted containers without the use of the apparatus described in the patent. Under such circumstances, mere gravity flow is all that is required to discharge the fluid. Nor is there any problem as regards sanitary treatment of the material. The neck of the bottle may simply be inverted into an "olla" or jar, into which the water flows freely, and from which it may be discharged by gravity through a tap carried by the jar.

The distribution of mayonnaise requires an entirely different treatment. Gravity feed is inadequate; a feeder must be used, and the problem of adequate stabilization during feeder operation must be solved. Possibly other ways of maintaining a container stable could have been devised; there is no need to discuss them, since obviously the stabilization afforded by the top of the stand, in cooperation with a restraint on the feeder, is entirely satisfactory. As will be pointed out, appellants have deliberately and wilfully copied the structure.

By the aid of the patented structure therefore, ready removal and replacement of the container and feeder assembly were facilitated; the mayonnaise was kept sealed against contamination.

The patentee Kermin testified regarding the immediate reception of the device by the trade. He says [R. p. 63]:

"I found, when I first presented this to the stores, to the merchants at the stores, that they received it as a boom to the business. As a matter of fact, they congratulated me on getting the bulk mayonnaise out of a distasteful condition. They always used to dig into that crock with a spoon, and mayonnaise would

come up on the spoon and get all over the hands and they had to wipe their hands before waiting on the customer, and all that sort of thing. This eliminated any possibility of the mayonnaise ever getting onto their hands, and made a clean, sanitary method of handling a product of that nature, because before it was made it would have a tendency to spread all over everything.

“There was another thing that this did over the old method in that they use to keep these crocks of mayonnaise usually under a counter, because it was bulky and unattractive, and it seemed to be the best place to keep it. Naturally, the consumer couldn’t see the mayonnaise, and they only bought when they wanted it. By this means, having a good-looking stand, one that was harmonious, brought the device with the merchandise or mayonnaise right before the public, and these things were almost invariably placed in the most prominent place in the market, which immediately increased the possibilities of selling mayonnaise. That is one of the points that I intended to achieve by that particular design. Also the fact that I chromium-plated the stand, and tried to make it as attractive as possible, where we would be able to put it out where the consumer would see it. In that way we were able to get it almost into any market we desired to, without any sales resistance whatever and being in the selling business that is a very, very important thing.”

He testified regarding its immediate commercial success [R. p. 66]:

“The first one we put out was on March 1st, 1935. I remember the location because it was the very first one, and it was quite an occasion for us. From that

time on we rapidly distributed 500 more to some of the choicest markets in Los Angeles and San Bernardino counties; also in Riverside county. Over a period of four months we distributed these 500.

“There were about 200 more placed up to about February of 1936, and then another 200 were placed between that time and about April of 1936—none from that time until the present. There were practically none placed in 1937 of new containers. I say ‘we placed them,’ I mean the Kermin Food Products.”

Appellants’ Device.

Appellants’ device is exemplified by Plaintiff’s Exhibit 7. It bears a startling resemblance to the apparatus illustrated in the patent; as a matter of fact, appellants Goldfarb and Goldfarb, do not deny that they copied appellee’s apparatus; and, in fact, appellants’ counsel stated before the trial court on argument that “we * * * made no bones about it that we had the device before us at the time we designed our own.” There is no material difference either in structure or function between the two devices. True, the appellant’s device is arranged to utilize a somewhat larger “cone”; the stand is braced somewhat differently; and the restraining means that grips the feeder has been changed from the *bottom* of the feeder to the *end* thereof. Such specious changes of course are to be expected in any case; wilful copying never is exact; some minor details are always altered to lend color to an allegation of non-infringement.

It is accordingly to be expected that appellants should try to magnify the insignificant differences noted; and even to assert that the modes of operation of the devices differ.

The Lower Court's Findings of Fact.

The court found that appellants' apparatus corresponds "to the combination set forth in Claims 2 and 3" [R. pp. 20, 47]; also that "Claims 2 and 3 . . . define invention over all of the alleged prior art introduced herein." [R. pp. 21, 47.]

The appellants have expressed generally, dissatisfaction with these fact findings. But much more than that is required to obtain a reversal. Nowhere have appellants pointed out any clear error that would require correction. On the contrary, there is ample evidence upon which these findings are properly based.

THE FINDING REGARDING VALIDITY.

The Finding Regarding Validity Should Be Sustained.

The finding that claims 2 and 3 are valid over all of the alleged prior art is one of fact. (*Stoody Co. v. Mills Alloys*, 67 Fed. (2d) 807 (C. C. A. 9th), at p. 812.) In addition, one who attacks the validity of a patent is required to make out his case by clear and satisfactory proof, or by proof beyond a reasonable doubt. In this connection, see the Ninth Circuit cases of *Wilson & Willard Mfg. Co. v. Bole, et al.*, 227 Fed. 607, at page 609; and *Banker's Utilities Co., Inc. v. Pacific National Bank*, 18 Fed. (2d) 16, at page 18.

In the latter case, the late Judge Dietrich of this court said:

"In their position plaintiffs are fortified by the presumptions attending a patent * * * and by the fact that their device is a commercial success and has brought on imitation."

The appellee's device is a commercial success; and appellants have copied it.

And, in addition, new rule 52 (a) of civil procedure, states: "Findings of fact shall not be set aside unless clearly erroneous." This is merely a restatement of the rule in effect in this circuit as well as in other circuits. For example, in *Collins et al. v. Finley*, 65 Fed. (2d) 625, the late Judge Sawtelle refers to this well established doctrine, at page 626:

"As was said by Judge Rudkin, in the case of *Easton v. Brant* (C. C. A.) 19 F. (2d) 857, 859, 'the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact.' "

And Judge Haney in *Crowell v. Baker Oil Tools, Inc.*, Fed. (2d), 39 U. S. P. Q. 357 (C. C. A. 9th), reaffirms this doctrine, quoting many Ninth Circuit authorities.

With this principle in mind, we may now consider whether there is any substantial reason for reversing the fact finding of the trial judge. In this connection appellants contend that the claims in issue are invalid for any of three reasons: anticipation, lack of invention, and lack of utility.

The material elements in the appellee's patent (Book of Exhibits, p. 2) are the inverted container 42, a feeder 10 closing the open end of the container, a stand 1 which detachably supports the assembly of container and feeder,

and a restraint 3 that engages the feeder and steadies the assembly. Not a single alleged anticipation shows this combination. All this is admitted by appellants' expert Bennett, who clearly refutes appellants' present contentions; and the contentions are without merit.

It is not enough that some of the references show invertible containers and stands, and a gravity feed. The combination claimed operates to steady a mayonnaise container and its feeder during the delivery of the viscous material; and yet without affecting the ease of removal and replacement of the container and feeder assembly.

For example, Oliphant (Book of Exhibits, p. 24) shows no restraint whatever. If mayonnaise were placed in the bottle 1, it could not get out of the bottle. This was shown by patentee Kermin. [R. pp. 143, 144.] And Bennett says [R. p. 125] that the flow of mayonnaise "would be so slow as to be utterly unsatisfactory." On page 126 of the record, Bennett finally admitted that there is no equivalent of a restraint in Oliphant.

Jacobson et al. (Book of Exhibits, p. 62), is also unsuitable for mayonnaise. The "measuring barrel" 15 is not attached in any way to the container 11. Instead it is permanently secured to the arm 18 (Book of Exhibits, p. 63, lines 71 *et seq.*):

"At said bearing the frame bar extends horizontally in a frame arm 18 past the center vertical axis of the casing, where it is apertured, as at 20, to receive the barrel 15, which is rigidly connected thereto."

Bennett says [R. p. 131] of this patent that:

"I hardly think that device shown in Jacobson 1-7 would be operative when used for dispensing mayonnaise. It is intended for sugar, and would probably work better with a granular dry material.

“Q. There is an inverted container in there, is there? A. No, you take off lid 12 to refill it.

“Q. And the passages in the measuring device shown in Fig. 2 are too small to permit the passage of mayonnaise, isn't that true? A. I don't know that it is too small, as much as the fact that mayonnaise would leak out everywhere. It would not work.”

Weatherhead (Book of Exhibits, p. 28) is another *liquid* dispenser, operating solely by gravity. There is no feeder attached to the bottle 10. Instead it is merely inverted into the mouth of the flared chamber 9. Mayonnaise could not possibly get out of this device.

Appellants' expert Bennett agrees with this. He says [R. pp. 127, 128] that it would not operate satisfactorily when used with mayonnaise. And he finally admitted that the dispenser in Weatherhead isn't joined to the small end of bottle 10.

Cordley (Book of Exhibits, p. 36) is similar to Weatherhead. It is a dispenser of *liquids*, the flow being obtained by gravity alone. The water in “measuring chamber” 1 is exposed to the air. The dispenser is merely a tap or faucet 5, that is carried by the chamber 1 and is not attached to the bottle 25. There is no restraint in Cordley.

Appellants' expert Bennett rules out Cordley as unsatisfactory for the purpose of appellee's device. He says [R. pp. 128, 129] that he hardly thinks the Cordley device can be used satisfactorily for dispensing mayonnaise; and that the dispenser in Cordley is not joined to the bottle; and that there is no restraining device for preventing wobble of the bottle 25.

Griffiths (Book of Exhibits, p. 32) is again a liquid dispenser. The cork *b* supports the bottle *a*. The dispenser or feeder operates solely by gravity, through a valve *h*. The passages through the dispenser are too small for satisfactory operation with mayonnaise.

Again, Bennett agrees with all this. He says [R. p. 128] that the bottle is supported on the dispenser, and not the dispenser on the bottle; and that the device is unsatisfactory.

Coffin (Book of Exhibits, p. 46) is intended to operate by feeder 12, but the container 1 is intended to remain in the position of Fig. 1, and to be filled by removing cover 2. There are no facilities for removing and replacing an assembly of container and feeder; nor will it work for mayonnaise.

Bennett [R. pp. 129, 130] says he doesn't believe Coffin is adapted for mayonnaise; that the passages are too small; that it is not likely that any liquid or mayonnaise would flow; and that the container 1 is adapted to be filled by lifting off the lid; and that there isn't any such a thing in appellants' or appellee's devices.

Cox (Book of Exhibits, p. 56) is a peanut or candy vendor. The dispenser acts by gravity alone and is permanently attached to the stand, as by its flange 7.

Bennett [R. pp. 130, 131] discusses this reference and admits that it is intended for granular materials of considerable size; that the Cox device would not be adapted for dispensing mayonnaise; and that the feed is purely by gravity.

Defendants' Exhibit A is merely an open hopper permanently attached to a pump and having legs. It is intended to be used merely for filling containers, and perma-

nently installed as in a mayonnaise factory. There is no provision for facilitating transportation of *closed* containers. Bennett says [R. p. 119] that "Exhibit A is a factory dispenser, used in filling jars in the factory, for sealing and sending out as completed parcels." And on page 132 of the record, Bennett says that in this exhibit there isn't anything that would show how a container would be connected with the pumping device, nor how it would be supported in relation to the pump.

In summarizing, appellants' expert Bennett [R. p. 131] says that of all of the seven patents discussed, not one of them would work unaltered for dispensing mayonnaise.

These admissions on the part of appellants' own expert, coupled with the immediate success of the appellee's device, are sufficient to affirm the finding of validity.

None of the references show the entire combination, which includes elements arranged in such a way as to provide a simple and effective system for dispensing mayonnaise from a closed container assembly, which may be readily inserted for use in a stand. The elements of the combination of claims 2 and 3 include a stand, a container, to which is removably attached a feeding device, and a restraint in the stand that engages with the feeding device; and the stand also acts to stabilize the container.

It matters not whether individual elements of the combination be old or new. The combination performs its intended function in a simpler and better manner than has been possible heretofore.

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before it is

evidence of invention. It was, certainly, a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent.”

Webster Loom Co. v. Higgins, 105 U. S. 580, 592 (1881), 26 L. E. 1177; 1882 C. D. 285, 21 O. G. 2031.

And in the leading case of *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658, 12 S. C. 825, the court says, page 161:

“It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its makers, nor adapted, nor actually used, for the performance of such functions.”

By every criterion, the finding of validity should be affirmed.

It is not essential to discuss at length appellants' allegation that the appellee's device lacks utility. In the first place, the brace 5 across the front of the stand (Book of Exhibits, pp. 2, 4, Figs. 2, 3 and 6), is as much a part of the stand as the sheet metal part. If the brace be omitted, then the stand of course can be stiffened in any other simple manner, as by increasing the thickness of the material. See, for example, Kermin [R. p. 73; pp. 85, 86, 87]; Bennett had to admit that the stand *can* support the container [R. pp. 133, 134]: “The empty container as it now stands is supported by the stand.” Then, comparing appellants' and appellee's stand, he says: “In both in-

stances there is a stiffening means for the frame, for the stand.”

In other words, the claim does not need to specify that the stand must be strong enough to support the container; any skilled worker would know that, and the use of braces or of heavier material to effect such a result is not properly a part of the claim. In appellants' device the brace has been moved up to cooperate with the upper part of the stand; otherwise the two stands are virtually identical. It is not necessary to include in the claim any auxiliary part of the stand; any more than to include such obvious elements as to the bolts or rivets for holding the parts together.

APPELLANTS INFRINGE CLAIMS 2 AND 3.

A comparison of the appellants' and appellee's devices (Exhibits 7 and 5) shows a very close copying not only of structure but of appearance. It is clear that appellants must have had the appellee's device to copy from. The hour-glass effect; the dispenser or feeder on the small end of the conical container; the general configuration of the stand, the suction feed at the bottom—all these speak more eloquently than mere words.

But there is ample evidence to show that this copying was actually deliberate. Crofut [R. pp. 94 and 95] stated that his company (H. Paulis, Inc.) early in August, 1935, was instructed by appellant Goldfarb to design a dispenser similar to the Kermin dispenser. Crofut decided not to comply with this request and returned a deposit of \$50 to Goldfarb. (Plaintiff's Exhibit 9, Book of Exhibits, p. 17.) Now, although Goldfarb went on the stand [R. pp. 139, 140] he did not refute this Crofut testimony.

And appellants' witness Hahn [R. pp. 100, 101] admitted that in designing appellants' feeder, he had Kermin's device before him.

Likewise, Schneider, appellants' witness, who made the sheet metal stand for appellants, admitted that he might have had the Kermin stand before him when he made his design. [R. p. 106.]

The finding of infringement by the trial court is likewise a finding of fact (*Winans v. Denmead*, 56 U. S. 330, at page 344); and therefore is to be affirmed unless clear error appears. There is no such error.

Appellants' device (Exhibit 7) operates substantially as appellee's; every element of claims 2 and 3 are present in this exhibit. Appellants admit that this exhibit includes the elements: a stand, a container, a feeder, and a restraint; but they insist that nevertheless there is a sufficient difference in detail so that infringement is avoided.

There is no substantial difference either in structure or in mode of operation of the two devices. Plaintiff's Exhibit 7 (which is an exemplification, stipulated to by appellants, of the appellants' devices), includes all of the elements referred to in claims 2 and 3. These claims refer to the restraint 3 in very broad terms, and in the following language:

“a restraining means within said stand adapted to engage with said feeding device when said container and feeding device attached thereto is introduced in inverted position into the stand through said restricted top and vertical wall opening.”

It so happens that in appellants' apparatus this restraint cooperates with the back end of the feeding device, whereas in appellee's device the restraint cooperates with the bottom of the feeding device. Such a change in location without change in function is of no moment on the question of infringement.

Such inconsequential arguments to the effect that there is no opening in the vertical wall of Exhibit 7, need no comment. The channel provided in the upper part of the stand forms a vertical wall opening and operates in the same manner as in appellee's device.

The only other point regarding infringement is that involved in the concluding statement of the two claims in issue. These statements are statements of function, to the effect that the container is stabilized by the top of the stand or that it is supported and stabilized by the flaring lip of the stand. The specification of the patent (Book of Exhibits, p. 6, lines 64 *et seq.*, first column), states that "A part of the weight of the container is supported by the upper end of the stand 1." The making of something stable implies a support for it. In the appellee's device the container and feeder assembly are supported in two places, each serving as a partial support. One place is at the top of the stand intermediate the top and bottom of the container; and the other support is provided by the restraint.

In appellants' device the function of the restraint to prevent the container from wobbling is identical with the function of the restraint in appellee's device. It may be true that in appellee's device the restraint serves as well at least partially to support the container.

The appellants in their brief on page 22, state:

“The patentee and defendants developed their devices from different prior structures. The patentee started with the old hopper with its three-legged stand and pump, Ex. A, while defendants adapted Oliphant to their needs.”

There is not an iota of evidence that this is what occurred. Quite the other way. The evidence clearly shows that the defendants did not bother to develop their own device but slavishly copied as closely as they dared from the existing structure of appellee.

The elements of the claims in issue are broadly defined. There is no reason why they should be narrowed to suit the purposes of the appellants. Nothing is said in claims 2 and 3 as to the location of the restraint nor is there anything in the claims that would make it necessary for the container to be supported *wholly or at all* on the restraint. Authorities are in accord with this contention, that elements of claims broadly defined should be broadly construed.

In the first place, it may be urged that appellee's patent covers an important contribution to the art. Previous mayonnaise dispensers have been impractical. It remained for appellee to provide a structure that could be easily kept clean and that could be utilized with facility for transporting mayonnaise in closed containers and for removing and replacing such containers from a stand, by merely inverting the container and disposing it therein.

It has long been the law in this circuit that where an invention is meritorious, the claims will not be narrowed for the purpose of permitting an infringer to evade lia-

bility. Thus in *Los Angeles Art Organ Co. v. Aeolian Co.*, 143 Fed. 880 (C. C. A. 9th), at page 887, the court says:

“The rule is well settled that if two machines be substantially the same, and operate in the same manner, though they may differ in form, proportion and utility, they are the same in principle.” (Quoting numerous authorities.)

See, also, *Jay et al. v. Suetter et al.*, 32 Fed. (2d) 879 (C. C. A. 9th), in which this doctrine is reaffirmed. The court at page 881 second column, quotes with approval from *Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works*, 261 Fed. 85, in which it is stated:

“Where a combination patent makes a distinct advance in the art to which it relates, * * * the term ‘mechanical equivalent’ should have a reasonably broad and generous interpretation.”

Other circuits have ruled consistently with this circuit in this regard. For example, in the recent case of *Oates v. Camp*, 83 Fed. (2d) 111 (C. C. A. 4th), the court says on page 114:

“There can be no question but that claim 10 of the patent reads on this device. Defendant’s contention that the claim must be limited to the exact device disclosed by the specification and drawings cannot be sustained. As said by the Supreme Court in *Smith v. Snow*, 294 U. S. 1, 11, 55 S. Ct. 279, 283, 79 L. Ed. 721, these ‘show a way of using the inventor’s method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use, since the claims of the patent, not its specifications, measure the invention.’”

And in this connection attention is invited to the recent Supreme Court case which is an authority on this question of infringement: *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30 at page 41; 50 S. Ct. 12; 74 L. Ed. 147. In this Supreme Court case the claims related to a refrigerator door latch and specified definite locations for various parts of the elements. Yet in spite of the change in the location of these elements, the Supreme Court had no difficulty in deciding that it was substantially identical with the structure defined by the patent claims. This rule was applied although the patent was not a pioneer patent. In coming to its conclusion the court says (page 41):

“There is a substantial identity, constituting infringement, where a device is a copy of the thing described by the patentee, ‘either without variation, or with such variations as are consistent with its being in substance the same thing.’ *Burr v. Duryee*, 1 Wall. 531, 573, 17 L. Ed. 650, 658. Except where form is of the essence of the invention, it has little weight in the decision of such an issue; and, generally speaking, one device is an infringement of another, ‘if it performs substantially the same function in substantially the same way to obtain the same result. . . . Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape.’ *Union Paper-Bag Mach. Co. v. Murphy*, 97

U. S. 120, 125, 24 L. ed. 935, 936. And see *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126, 137, 24 L. Ed. 1000, 1005. That mere colorable departures from the patented device do not avoid infringement, see *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930, 931. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement. *Ives v. Hamilton*, 92 U. S. 426, 430, 23 L. Ed. 494, 495. And even where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee and cannot be extended to embrace a new form which is a substantial departure therefrom, it is nevertheless infringed by a device in which there is no substantial departure from the description in the patent, but a mere colorable departure therefrom. Compare *Duff v. Sterling Pump Co.*, 107 U. S. 636, 639, 27 L. Ed. 517, 518, 2 Sup. Ct. Rep. 487.

“The fact that, as the Dent device makes two reciprocal changes in the form of the Winters and Crampton structure, one by the insertion of the lug on the keeper head, and the other in the shortened upper arm of the latch lever, and one alone of these changes cannot be substituted in the Winters and Crampton structure without the other, so as to make it operative, is plainly insufficient to avoid the infringement.”

To the same effect see *Sloan Valve Co. v. John Douglas Co. et al.*, 10 Fed. (2d) 885, Dist. Court of Ill.; *Carson Co. et al. v. Anaconda Copper Mining Co.* (C. C. A. 9th), 26 Fed. (2d) 651, page 662.

There is yet another reason why claims 2 and 3 should be broadly interpreted with regard to such expressions as "restraint." It is noted that some of the other narrower claims not in issue, such for example as claim 1, specify a horizontal rest. Under such circumstances it has been held that a limitation present in one claim is not to be implied in other claims in the same patent, where such a limitation is not expressed. In this connection see *Jones et al. v. Sykes Metal Lath & Roofing Co.*, 254 Fed. 91, at page 96; also *Peerless Wire Fence Co. v. Jackson Fence Co.*, 226 Fed. 774. The syllabus in this latter case is especially apt:

"Where a patent contains both a broad and a narrow claim, and suit is brought on the broad claim, the court cannot construe into it a limitation not therein expressed, but which is expressed in the narrower claim, and by which alone one is distinguished from the other."

By all the rules of interpretation of claims, it is thus clear that appellants have appropriated the substance of appellee's invention and they should be held liable therefor.

THE APPELLANTS SHOULD BE HELD TO AN ACCOUNTING.

In arguing that appellants should be freed from any accounting they failed to recognize well established principles long enunciated and often reaffirmed.

It must be remembered that the appellants herein are *direct* infringers, and not contributory infringers. If appellee were complaining merely of the sale of mayonnaise by appellants, intended to be distributed through some one else's infringing dispenser mechanism, then there might possibly be some weight to the argument of appellants.

However, in this case the appellants *made and used* the infringing structure. They are therefore direct infringers.

That they have caused damage to the appellee is clear from the record. Thus Kermin [R. p. 67] states that after 900 devices had been placed by the appellee, some of them were returned. In almost every instance they were displaced by the appellants' dispensers. There is thus direct damage. Were it not for the infringing acts, appellee would have secured additional royalties, because appellee's licensee, Kermin Food Products Company, would have been able to keep a greater number of the dispenser devices into use.

An accounting for profits is also proper under the authorities.

An entirely different basis for an accounting for profits exists when the defendants are *using* a patented structure,

instead of *selling* embodiments thereof. This is clear from the statements, for example, in Deller's Edition of Walker on Patents, Vol. 3, page 2206, paragraph 856, in which the learned author says:

“Where unlawful use of a patented article or process constitutes the infringement involved in a suit in equity, the infringer's profits are ascertained by a rule quite different from either of the foregoing. That rule, in its generic character, may be formulated as follows: ‘The advantage,’ e. g., the saving, ‘which the defendant derived from using the complainant's invention, over what he could derive from using any other process or thing, which was known prior to that invention, constitutes the profits which the complainant is entitled to recover.’”

This statement is, of course, a crystallization of important and leading cases such as *Mowry v. Whitney*, 81 U. S. 620; *Carwood Patent*, 94 U. S. 695; *Webster Loom Co. v. Higgins*, 43 Fed. 673.

In *Novelty Glass Mfg. Co. v. Brookfield* (C. C. A. 3rd), 170 Fed. 946), the plaintiff's right to recovery of profits of the character indicated in this case are fully substantiated. In the *Novelty Glass* case the infringing machine was one for making glass insulators. The defendant did not *sell* the machine, but *used* it at a profit in the manufacture and sale of the insulators. The insulators themselves were not covered by the patent.

Lastly, another analogous case involving the accounting for profits is *Union Electric Welding Co. v. Curry*, 279 Fed. 465 (C. C. A. 6th Cir.). In that case the patent covered a tool for tying wires. The defendant infringed by distributing the tool, and selling the ties that were

adapted to be operated upon by the tool. In deciding that the profits of the sales of the ties formed the proper basis for recovery, the court says (page 468):

“The plaintiffs adopted the general plan of business illustrated by the Heaton-Peninsular Case, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and the Dick case, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. They did not sell this tool at a profit but placed it with those who used bags in great quantities, like cement manufacturers, and who desired to tie their bags by using this tool. The plaintiffs then derived their profit from the business of making wire ties suitable for use in this tool and selling them to the users of the patented machine. The device could not be operated, except with ties of the precise construction made by the plaintiffs, and the ties which they made were of no use, excepting in the patented machine. There was no patent upon the ties. The defendant adopted precisely the same method of business in connection with its infringing machine. It made a large number of machines and placed them with the bag users upon the payment of a nominal charge—somewhat less than the actual cost of construction. The special wire tie which it made would not fit and was not adapted to plaintiff’s patented machine, and could be used nowhere excepting in defendant’s infringing machines, and likewise these machines could not be used, excepting with this particular tie which was made by defendant and by no one else.”

So here, the appellants’ containers could cooperate only with appellants’ stands.

The fact that the defendant made tools that infringed the patent was sufficient. The court in this regards says (p. 469):

“* * * The defendant actually made tools infringing the patent. It sold no ties to the users of the patented machine. It sold ties only to the users of the infringing machine; and it had no other business (save for the 4.36 per cent. above noted) except making and placing the infringing machines and furnishing the materials for their use. * * * From its conception, through birth and life, and until its death, it was an indissoluble part of a plan to destroy plaintiff’s rightful monopoly in the use of their patented machine. No reason is apparent why its profits should not be treated as received in trust for plaintiffs upon the same principle which controls the profits of a direct infringement.”

The same general doctrine regarding accounting for profits has been adopted by our own Ninth Circuit, in *O’Neal v. San Jose Canning Co.*, 33 Fed. (2d) 892. In that case, the advantages of using the patented mold for canning beans were held to be accountable.

It is respectfully submitted that the interlocutory decree appealed from should be affirmed in every particular.

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